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No. 547

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

THOMAS J. KEHOE, ALSO KNOWN AS THOMAS KEHOE,

Petitioner,

vs.

CHARLES C. BOYLE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MICHAEL KEHOE, ALSO KNOWN AS M. E. KEHOE, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INVOLVED

AMENDMENT (IV)

(SEARCHES AND SEIZURES)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT (V)

(RIGHTS OF PERSONS)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (XIV)

(RIGHTS OF CITIZENS)

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES OF COURT INVOLVED

19. Considerations governing review on certiorari. — 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

STATUTES INVOLVED

1257. State courts—Appeal—Certiorari. — Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (June 25, 1948, c. 646, Sec. 1, 62 Stat. 929.)

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vs.

CHARLES C. BOYLE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MICHAEL E. KEHOE, ALSO KNOWN AS M. E. KEHOE,

REVEREND WILLIAM SHAW

ST. EDWARDS CATHOLIC CEMETERY

ST. TERESA CHURCH

ST. EDWARDS CHURCH

LITTLE SISTERS OF THE POOR ON RIDDLE ROAD

ST. VINCENT DE PAUL CONFERENCE OF ST. TERESA CHURCH

LITTLE SISTERS OF THE POOR ON FLORENCE AVENUE

ROSE KEHOE, ALSO KNOWN AS ROSE PRENTICE KEHOE

LIEUTENANT THOMAS P. KEHOE AKA THOMAS KEHOE, JR.

KATHERINE S. KEHOE, WIFE OF LIEUTENANT THOMAS P. KEHOE, AKA THOMAS KEHOE, JR.

THE UNKNOWN HEIRS, DEVISEES, LEGATEES, EXECUTORS, ADMINISTRATORS AND ASSIGNS OF MICHAEL E. KEHOE ALSO KNOWN AS M. E. KEHOE

KARL J. ALTER, ARCHBISHOP OF CINCINNATI, TRUSTEE, etc.

MOST REVEREND RICHARD ACKERMAN, S.T.D., ROMAN CATHOLIC BISHOP OF THE DIOCESE OF COVINGTON, KENTUCKY, etc.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Unfortunately, we must take factual issue with many of the allegations contained in contestant's statement of the case. Rather than categorically correct these allegations, we will give to the Court our own statement of the case, which will be a very brief resume of the preponderance of evidence. Record page references apply to the record of the evidence adduced in the trial court, should this Court desire therein to inquire.

The terms and provisions of Mike Kehoe's will were an affirmation and a confirmation of his life-long affections and interests. He divided his estate among nine beneficiaries as follows:

1. The Rev. William Shaw, a relative and close friend 10%
2. St. Edwards Catholic Cemetery, Cynthiana, Kentucky, where he and all but one of his ten brothers and sisters were buried 10%
3. St. Teresa's Church (his Parish Church) for the saying of Masses for the deceased members of the Kehoe family 10%
4. St. Edwards Church, Cynthiana, Kentucky where he and his ten brothers and sisters had been baptized and spent their early years, for the saying of Masses for the deceased members of the Kehoe family 10%
5. St. Teresa's Church (his Parish Church), for the new Church Fund 10%
6. The Little Sisters of the Poor, Riddle Road, Cincinnati, Ohio 10%
7. The Little Sisters of the Poor, Florence Avenue, Cincinnati, Ohio 10%
8. St. Vincent de Paul Conference of St. Teresa's Church, an organization devoted to taking care of the poor of all faiths and creeds ... 10%
9. His nephew, Thomas Kehoe, Thomas's wife, Thomas's son and Thomas's daughter-in-law, to be divided equally among them 20%

The will was a simple and forthright document. The evidence was not only conclusive, but undisputed that he planned and considered carefully the distributions made therein (R. 449, 329, 391).

Mike Kehoe's life was a blueprint of his will. Mike's parents were born in Ireland, immigrated to Cynthiana, Kentucky, where Mike and his ten brothers and sisters were born. Mike outlived all of his brothers and sisters. He was a bachelor. Most of his brothers and sisters did not

marry, and of those that did, only one left issue and that was the contestant, who, except for occasional visits to Cincinnati, had spent his entire life elsewhere. The contestant attended Xavier University, but saw little or nothing of Mike during those years, principally for the reason that contestant resided at the Fenwick or with an Aunt Cavanaugh, and Mike was living out West.

Mike and his entire family were Roman Catholics. Mike went to Mass and Communion every day of his life. The latter years of his life he spent with three maiden sisters, all of whom predeceased him and died in their 80's. Two of these sisters died leaving wills, which were executed at the same time Mike had drawn a prior will. Following the death of the last sister, Phoebe, Mike began working on a new will. Phoebe died in May, 1959 and Mike executed the will in contest on August 19, 1959 (R. 448).

Mike Kehoe had spent his life at one trade, i.e., that of a skilled casket finisher. He had worked all through the war and until five years of his death (R. 395).

Mike enjoyed company all his life. He loved people. No witness ever heard Mike say a bad word about anybody. After his retirement he continued to go to Mass and Communion 7 days a week until the day he sustained his stroke in February, 1961, 28 days prior to his death. After his retirement, his routine not only included going to Mass and Communion, but he continued visiting the sick poor at St. Francis Hospital every Sunday, in addition to making visits to the poor for the St. Vincent de Paul Society of his Parish. After his morning visits to church, where, in order to take Communion, he was required to walk to the Communion Rail, climb up the marble steps and kneel without any support, walk down the steps, and back to the pew, Mike would adjourn to Ubell's Cafe at the corner of Glenway Avenue and Cleves-Warsaw Pike, a

very busy intersection. Mike had to cross this intersection to get to the cafe, recross it on the way home and at no time was Mike ever struck by an automobile, or was he even close to being struck by an automobile, Mike was never known to drink anything stronger than beer, but at Ubell's Cafe he would have a couple of beers, buy his friends beers and sit and chat with them. All of Mike's friends were younger than he. They enjoyed the old man's company and they enjoyed talking with him. They all thought he had an excellent sense of humor and was witty (R. 294, 324, 339, 348, 361, 368, 376, 382).

Mike was not a controversial character, but he was determined and his primary interest in life was the underprivileged and he would go to one or other of the hospital poor wards and he brought the people there candy silver dollars and church bulletins, regardless of their faith or creed. He would collect magazines from his friends and have them bring them to the cafe, so that he would have a lot of them (R. 348, 376, 382, 438).

During his latter years, Mike would work in the yard, even slip roses. He did this up until one month before his death. He would watch television without glasses. In fact, Mike did not wear glasses at all, although many years before he had been fitted with glasses. The optometrist who served him said that Mike seemed to get a second sight and no longer needed the glasses for many years prior to his death (R. 370, 335, 306, 388).

No one ever saw Mike lose his temper. He had an excellent memory. He handled his own business affairs. Employees of the Fifth-Third Union Trust Co. branch office on the corner of Glenway and Cleves-Warsaw Pike testified to his frequent visits to his safe deposit box and his transacting all other banking business, not only for himself but also for his sisters (R. 308, 401, 416).

The evidence disclosed that Mike and his sisters had a room in the basement where they kept bonds and money and other valuables. Without glasses, he could read and manipulate the combination on the safe (R. 89). He never was sick, only had some back trouble from lifting a 100 lb. potato sack (R. 306, 337).

Mike's family had done a great deal to establish the cemetery at Cynthiana, Kentucky and his parents and all of his brothers and sisters, except one, were buried there. Mike himself was buried in Cynthiana, Kentucky. He made frequent visits to see the cemetery and the little church where he and his brothers and sisters were baptized. It was to this church and this cemetery that Mike left 10% each.

Mike was tremendously interested in his Parish church, St. Theresa's Church. He was tremendously interested in the new church that was being built before he died. He remembered the new church to the extent of 10%, as he likewise remembered the church for an additional 10% for the saying of Masses for the repose of the souls of the deceased members of his family.

Mike was tremendously interested in Father Shaw. He was very proud to have a relative that had become a Catholic priest. He saw this relative frequently. He talked about him frequently (R. 324, 438). Mike discussed his last will with Father Shaw several months after it was executed (R. 301).

Mike Kehoe was a man to remember his friends when they were sick and when their relatives died. Up to the time of his stroke he was well aware of the dates when his bonds matured (R. 461). He thought what God had given him should go back to God by way of helping those who could not help themselves. He was on his way to Mass on the snowy morning he suffered his stroke, 28 days before his death (R. 386).

In the light of the foregoing facts, can it be said otherwise than that Mike's will was the true expression of his life's activities and desires?

On cross-examination, the foregoing facts were presented to contestant's expert witness, William L. Roach, M.D., and at p. 258 and 259 of the record, this witness was asked whether or not such a man had the capacity to form the intention and purpose to make a will. His reply at the top of p. 259 was in these words: "Most of that describes a person keenly able to exercise good judgment."

At various times during the trial, on cross examination, petitioner made some very illuminating admissions with reference to the relationship between himself and his deceased uncle. Two examples of these are as follows: "As a matter of fact I would do anything I possible could to keep out of his sight (uncle's) at most times." R-220. (Parenthetical material ours.) On the same page of the record, he likewise admits to the following: "I never did anything for him, and I never did anything against him. I just let him alone."

Petitioner, in his brief, makes certain unpleasant and unsupported accusations against respondents and the Church to which they belong. For the sake of the record and the patience of this Court, respondents are content merely to enter a categorical denial to every one of these charges.

ARGUMENT

Pages 5 to 14 of petitioner's brief, under the heading "Reasons for Granting the Writ" present no material which this Court could entertain under Title 28 of the United States Code, Section 1257, or under its own Rule 19.

Pages 14 through 17 of petitioner's brief present alleged violations of petitioner's rights to protection against unlawful seizure of person or property under the provisions

of Amendments IV and V to the Constitution of the United States, by virtue of the fact that the trial Court admitted into evidence a certain letter dated September 19, 1959, which petitioner wrote and mailed to his decedent uncle, Mike Kehoe, whose will petitioner sought to set aside in the within action.

The above letter was found in the deceased uncle's files by his executor, one of the respondents herein, and was in no way "seized" from petitioner. It was admitted into evidence as a written statement containing admissions against petitioner's interests and claims, an evidentiary procedure common in courts throughout this nation. It is apparent that under no stretch of anyone's imagination could Amendments IV or V have been violated by the introduction of this letter into evidence.

Pages 15, 16 and 17 (the concluding pages of petitioner's "Reasons For Granting The Writ") allege that the petitioner's rights under Amendment XIV of the Constitution of the United States were violated because the jury, the trial and appellate courts found that his deceased uncle freely and voluntarily disposed of his earthly goods in a manner not to petitioner's liking. In other words, petitioner argues that because the jury decided against him and because the State trial and appellate courts confirmed this verdict, he was thereby deprived of property without due process of law Such an argument is not only untenable, but is a non sequitur.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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